IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 481

JAMES J. LAUGHLIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

Opinions of the Courts Below

The opinion below announced April 30, 1945, appears in the record at pages 354. Rehearing was denied May 8, 1945.

The memorandum opinion of the District Court will be found in the record at pages 25.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case

A concise statement of the case containing, as the petitioner believes, all that is material to the consideration of the questions presented is set forth in his petition and is not repeated here.

Specification of Errors to Be Urged

The Court of Appeals erred:

1. In holding that the contempt was not within the rule laid down in *Nye* v. *United States*, 313 U. S. 33.

2. In holding that the contempt was in the presence of the Court.

3. In holding that petitioner was not entitled to a jury trial.

4. In holding that the petitioner's guilt was established beyond a reasonable doubt.

ARGUMENT

1. The United States Court of Appeals for the District of Columbia erred in holding that this case was not within the rule laid down in Nye v. United States.

It is significant in the opinion of the United States Court of Appeals for the District of Columbia that no reference whatever is made to the case of *Nye* v. *United States*. In the instant case it cannot be disputed that when the various motions were filed they were filed with the clerk of the Court and in the office of the clerk some distance from the courtroom and at a time when the Judge was not on the bench or in the courtroom. It also cannot be disputed that the affidavit of bias and prejudice was filed with the Clerk at a time when the Judge was not on the

bench and not in the courtroom. Therefore it would seem that the case comes squarely within the *Nye* case. The ruling of the court below would have been entirely proper if that court took as its authority the case of *Toledo Newspaper Company* v. *United States*, 247 U. S. 402, 38 S. Ct. Rep. 565, but it must be remembered that *Toledo Newspaper Company* v. *United States* was overruled by *Nye* v. *United States*, 313 U. S. 33. We find in *Nye* v. *United States* the following:

> "* * * The phrase 'so near thereto as to obstruct the administration of justice' likewise connotes that the misbehavior must be in the vicinity of the court. * * * It is not sufficient that the misbehavior charged has some direct relation to the work of the court. 'Near' in this context, juxtaposed to 'presence', suggests physical proximity not relevancy. In fact, if the words 'so near thereto' are not read in the geographical sense, they come close, as the government admits, to being surplusage. There may, of course, be many types of 'misbehavior' which will 'obstruct the administration of justice' but which may not be 'in' or 'near' to the 'presence' of the court. Broad categories of such acts, however, were expressly recognized in Section 2 of the Act of March 2, 1831 and subsequently in Section 135 of the Criminal Code."

It is recognized in this ruling that many acts may be done in connection with judicial proceedings that would not constitute contempts in the presence of the court, but which would not go unpunished. Section 241, Title 18 of the United States Code provides punishment for such acts and surrounds the accused with the safeguards of a criminal trial including the right to trial by jury. We believe that this Court in the *Nye* case was of the view that the courts had unduly expanded the right to punish by contempt and laid down a rule of procedure in the *Nye* case that limited the power of Federal courts to punish for contempt.

We believe that is well illustrated in the case of *Schmidt* v. *United States*, 124 F. (2d) 127 C. C. A., Ohio. In that case it was held that where a defendant had filed an affidavit in the Clerk's office it was not in the presence of the court or so near thereto as to obstruct the administration of justice in that it did not appear that the court was in session at the time and therefore the defendant could not be adjudged in contempt of court.

2. The Court of Appeals erred in holding that the contempt was in the presence of the Court.

We believe that this point is covered by the first point and that the matter is controlled by the decision in the *Nye* case.

We believe it well to refer to the case of *Pendergast* v. *United States*, 317 U. S. 412; 63 S. Ct. Rep. 268. That case turned on the statute of limitations and the court left undecided whether the action of Pendergast and others constituted punishable contempt.

3. The Court of Appeals erred in holding that petitioner was not entitled to a jury trial.

Petitioner concedes that under the common law in a case of this kind an accused would not be entitled to a trial by jury. However, it is contended that in view of the construction now placed upon contempt of court as outlined in the case of *Nye* v. *United States* and *Bridges* v. *State of California*, that in a case such as this the right of trial by jury is permitted.

While there is considerable language in the opinions relating to contempt that such actions are "quasi-criminal" and do not qualify as full-fledged crimes and hence do not warrant a trial by jury which contention is amply supported by decisions (*Eilen Becker* v. *Plymouth County*, 134 U. S. 31; *Gompers* v. *United States*, 233 U. S. 604), neverthe-

less, modern research indicates that these decisions are based on the *Almon* case and conclusions reached by Mr. Justice Blackstone in his Commentaries, based again on the *Almon* case, are erroneous.

As was stated by an eminent jurist while a professor of law:

> "Building on the earlier researches by Mr. Solley Flood, the Senior Master of the English Chancery Division, Sir John Charles Fox, in a notable series of essays has rendered luminously clear the common law history of procedure governing the trial of criminal contempt."
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> *The King* v. *Almon*, 24 L. G. R. 184, 266.
> The Summary Process, 25 L. G. R. 238.
> Eccentricities of the Law of Contempt, 36 L. G. R. 394.
> The Nature of Contempt of Court, 37 L. G. R. 191.
> The Practice in Contempt Cases, 38 L. G. R. 185.
> The Writ of Attachment, 40 L. G. R. 43.
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> "Down to the early part of the 18th century cases of contempt even in and about the common law courts when not committed by persons officially connected with the court, were dealt with by the ordinary course of law; i. e., tried by jury except when the offender confessed or when the offense was committed 'in the actual view of the court' * * * The reason for the rule was found in the very conception of criminal contempt. Selden gives us the meat of the matter. 'Contempts are only trespasses, etc., and punishable only by fine and imprisonment or by both but not until conviction of the parties (as neither are other like offenses) unless the contempt be in the face of some court against which it is committed, which supplies a conviction." (Proceedings against William Stroud, 3 Howell State Trials 235, 267 (1629).
>
> "But after the Star Chamber appeared on the scene it assumed authority over contempts against any court and it asserted its power, unlike the common law courts, by a summary procedure without a jury

(24 L. G. R. 271 et seq.). The Star Chamber was abolished in 1641. But the atmosphere of corrupt and arbitrary practices which it had generated partly survived. Gradually there appear traces of infection in the King's Bench which succeeded to the Court of Star Chamber (24 L. G. R. 271). * * * Thus, gradually the summary process of the Star Chamber slipped into the common law courts, rendered also somewhat familiar by a series of statutes which gave the courts authority over some special offenses without trial by jury (25 L. G. R. 354). Nevertheless, until 1720 there is no instance in the common law precedents of punishment otherwise than after trial in the ordinary course and not by summary process * * * The original rolls of the English courts to the remotest times crushingly disprove Wilmot's claim (in Rex v. Almon). The ground of Wilmot's assumption that contempts out of court were punishable by summary process in accordance with 'immemorial usage' has been swept away by the learned labors of Sir John Charles Fox."

4. The Court of Appeals erred in holding that the petitioner's guilt was established beyond a reasonable doubt.

It is contended that in a contempt case presumption of innocence obtains and triers must be satisfied beyond a reasonable doubt of accused's guilt. See *Michaelson* v. *United States*, 266 U. S. 42, 45 S. Ct. 18. See also *United States* v. *Balam*, 26 Fed. Supp. 491.

In the case of *Blim* v. *United States*, 68 F. 2d 484, it was held:

> "Contempt proceeding for obstruction of justice by means of false testimony before grand jury being criminal in nature, respondent is presumed to be innocent, and must be proved guilty beyond a reasonable doubt."

In the recent case of *In re Eskay*, 122 F. 2d 819, it was held:

> "Where contempt has not been committed in the presence of the court and evidence must be taken to establish the contempt, the court's summary powers are curtailed to the extent that accused must be presumed to be innocent, need not testify against himself and must be found guilty beyond a reasonable doubt."

Rules for preserving discipline, essential to the administration of justice came into existence with the law itself and contempt of court (contemptus curiae) has been a recognized phrase in English law from the twelfth century to the present time.

The punishment of contempt is the basis of all legal procedure and implies two distinct functions to be exercised by the court, (1) enforcement of the process and orders of the court, disobedience to which may be described as "civil" contempt and (2) punishment of other acts which hinder the administration of justice, such as disturbing the proceedings of the court while it is sitting or libeling the judge or publishing comments on a pending case which are both distinguished as criminal contempt:

Civil contempt is a wrong for which the law awards reparation to the injured party, which, though nominally contempt of court is a wrong of private nature between subject and subject and the punishment is a form of execution for enforcing the rights of a suitor. Actions of criminal contempt are those proceedings used to vindicate the authority of the court.

The leading case on the procedure for punishment of contempt of court and the root of the present practice in cases of criminal contempt is *King* v. *Almon*, in which a bookseller was tried for libel of Chief Justice Mansfield and a judgment was prepared but never delivered by

Mr. Justice Wilmot. This judgment, written in the year 1765 holds that a libel on a judge in his judicial capacity is punishable by the process of attachment, without the intervention of a jury and that this summary form of procedure is "founded on immemorial usage" (Wilmot's Notes, p. 243).

Blackstone enumerates various classes of contempts and amongst them contempts by speaking or writing contemptuously of the court or judges acting in their judicial capacity by printing false accounts of pending causes. He adds "The process of attachment for these and like contempts must necessarily be as ancient as the laws themselves" (4 Commentaries 286).

However, he also points out that summary punishment for contempt out of court and the use of attachment and the examination of the accused by interrogatories (an English practice) rendered "this method of making the defendant answer upon oath to a criminal charge is not agreeable to the genius of the common law in any other instance" (4 Commentaries 287-288).

It is probable that Blackstone was influenced by Wilmot in arriving at this determination of the law since it is known that portions of the Commentaries were submitted to Wilmot by Blackstone for the former's approval (Wilmot's Memoirs, p. 201).

The first reported case in an English Court in which the undelivered judgment in *Almon's* case was cited and adopted by the court is *Rex* v. *Clement*, which involved the liability of the defendant for contempt for publishing a report of a trial in violation of a court injunction. The King's Bench did not rule on the contempt, merely holding that the injunction was valid and an indictment for contempt unnecessary. The court in its opinion refers to Wilmot's decision in *Almon's* case and indicates its approval of the rule (*Rex* v. *Clements*, (1821) 4 Barn & Ald. 218).

Summary trial in constructive contempt cases in England received a set-back in the case of William Bingley due primarily to the obstinancy of the respondent. Bingley was publisher of the "North Briton," a newspaper in which the publisher charged Lord Mansfield of having acted as counsel for the prosecution in the *Wilkes* case. In June, 1768, Bingley was brought before the court upon a writ of attachment and committed to Newgate. In January, 1769, he was again committed and refusing to enter into a recognizance to answer interrogatories he remained in prison until June, 1770. Thus it became apparent that the defendant might remain in jail the rest of his life buf this dilemma was avoided by the Attorney General who himself applied to the court for discharge. The result of this case was to give a decided check to attachments for contempt out of court. In 1793 Bingley wrote that since his case there had been no attachments for constructive contempts in the intervening twenty-four years (Bingley's case, 1768 (not reported)).

In 1785 Lord Erskine, then at the Bar, wrote an opinion laying down the principle that no crime can be considered a contempt of any particular court so as to be punishable by attachment unless the act which is the object of the punishment be in direct violation or obstruction of something previously done by the court which issues it and which the party attached was bound by some antecedent proceeding of it to make a rule of his conduct.

Lord Erskine when Lord Chancellor acted upon this principle in an important case and indicated that he was not prepared to subscribe to the doctrine that constructive contempt is punishable by attachment (*Exparte Jones*, (1806) 1 Veo. 237).

This decision of the eminent judge was due to the antipathy toward summary punishment of contempts of court based on the doctrine in *Almon's* Case and the assumption of

the eminent justice that such was the law and that it had so existed from "time immemorial" although as Blackstone pointed out, it was an anomaly in the English jurisprudence.

The first case in the United States involving interpretation of the *Almon* case was the impeachment of Judge Peck in 1831 before the Senate of the United States on the charge that, while sitting as a judge of a district court, he had caused an attachment for contempt to issue against one Lawless, an attorney practicing in his court and had summarily (without jury) sentenced him to twenty-four hours imprisonment and suspended him from practice for eighteen months. The contempt consisted of publishing in a newspaper a letter which the judge held to be a libel on himself in his judicial capacity.

Almon's Case was the principal authority relied upon. James Buchanan, the Chief Manager of the impeachment, a distinguished member of the bar and later President felt otherwise and argued that *Almon's* case is no case at all but merely an opinion of a judge which was never delivered and that the power to punish the offense of scandalizing a court is a Star Chamber power.

That this was his firm conviction was indicated by the fact that immediately upon the acquittal of Judge Peck by a vote of 22 to 21, Buchanan took action to fulfill the pledge made in his closing argument when he said:

> "I will venture to predict that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power and Mr. Lawless has been its last victim."
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> (Report of the Trial of James H. Peck, p. 430.)

On the day after the acquittal, as head of the Judiciary Committee of the House, Mr. Buchanan drafted an act to limit the power of the Federal judiciary in constructive con-

tempts. This statute is now Section 385 of the United States Code (Judiciary) and Section 241 of the United States Code (Criminal). One provision of Section 385 being:

> "That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court shall not be construed to extend to any cases except the misbehavior of any person or persons in the presence of said courts or so near thereto as to obstruct the administration of justice. * * *"

under which section the present matter is apparently brought.

For a definition of "misbehavior" see the dissenting opinion of Mr. Justice Holmes in *Toledo Newspaper Co.* v. *United States,* (1918) 247 U. S. 402.

For definition of "so near thereto as to obstruct" see *United States* v. *Nye, supra.*

The Affidavit of Bias and Prejudice against Judge Eicher.

As will be noted in the opinion of the Court of Appeals the case largely turned on the matter of the affidavit of bias and prejudice. An attorney, of course, has a right to file an affidavit of bias and prejudice against a judge in a federal court. It is true that a strict interpretation of the statute would require that such an affidavit be filed ten days before the beginning of the trial. However it has been generally recognized in the District of Columbia due to the fact that there are twelve judges on the local court that the time limitation is not strictly adhered to in this jurisdiction. As a matter of fact the Court of Appeals in the case of *Whitaker* v. *McLean,* 72 U. S. App. D. C. 259; 118 F. 2d 596, recognized that where a trial judge manifests prejudice and bias after a trial is in progress he can still be disqualified. It must be remembered that when the affidavit of bias and prejudice against Judge Eicher was filed

the jury had not yet been sworn. The record will show that there was widespread dissatisfaction with the conduct of Judge Eicher in the sedition trial. The record will show that some sixteen attorneys had joined in a motion asking Judge Eicher to disqualify himself due to his showing of bias and prejudice. If the defendants or any of them honestly believed that there had been an agreement between the late President Roosevelt and the late Judge Eicher as to the conduct of this case, clearly it would unfit Judge Eicher to proceed further in the case. No person now living can say with positiveness that the allegations in the affidavit of bias and prejudice were untrue. If the defendants honestly believed that there was an understanding between the late President Roosevelt and the late Judge Eicher, it would be his duty to make that fact known. We say further that it would be the duty on the part of the attorney for the defendants to certify to the fact that the affidavit of bias and prejudice was filed in good faith. We are not unmindful that an attorney has a duty to maintain proper respect for the Judiciary. It also follows that if an attorney has any evidence as to any misconduct as to the Judiciary it is likewise his duty to make that fact known. We know from human experience that many many things have happened in this country within the past ten years that has shaken the confidence of the public among certain of the Judiciary and very properly so.

In the case of Woolley et al. v. *Superior Court in and for Stanislaus County et al.*, 66 Pac. (2d) 680, we find this:

> "We cannot agree with the trial court however, that the presentation or the filing of the statement of disqualification constituted a contempt of the court. * * * No criticism can be made of the manner of presentation, and we must assume, in the absence of any reply by the trial judge, that counsel acted in good faith in the recital of the facts upon which they based their allegations of bias and prejudice.

"We are now passing upon the conduct or remarks of counsel during the progress of a protracted trial, carried on during the very hottest part of an extremely hot summer in the San Joaquin Valley, and in a hall probably not conveniently arranged, but only with the time and manner of presenting this charge of disqualification. We cannot find in that alone sufficient grounds to uphold the judgment of contempt. That portion, therefore, of the judgment finding those attorneys who presented the statement of disqualification guilty of contempt is set aside."

In *McClatchy* v. *Superior Court of Sacramento County*, 51 Pac. 696, at 697, we find the following:

"The publication of the truth as to legal proceedings is not a contempt of court" (citing In re Shortridge, 99 Cal. 526, 34 Pac. 227).

In the case of *Hutton* v. *Superior Court of City and County of San Francisco*, 81 Pac. 409, we find this:

"Contempt proceedings are quasi criminal in their nature, and an intent to commit a forbidden act is as essential to guilt as in the case of a charge of a criminal offense."

In the case of *Mitchell* v. *United States*, 126 Fed. 550, the Court said:

"But the statute, by its own terms, provides a safeguard against the abuse of the privilege granted by the statute, and that well-founded safeguard is the requirement that the affidavit must be accompanied by a certificate of counsel of record, and without which the affidavit is ineffectual to disqualify the judge. This requirement is founded on the assumption that a member of the bar or counsel of record will not indulge in reckless disregard of the truth, and further attests to the good faith and belief of the affiant. Citing Bealand v. U. S., 117 F. 2d 958; Cuddy v. Otis, 33 F. 2d 577;

Morse v. Lewis, 54 F. 2d 1027; Currian v. Mourse, 74 F. 2d 273; Newman v. Zerbst, 83 F. 2d 973."

In the case of *Bealands* v. *United States,* 117 F. 2d 958, the Court said:

> "A judge may not consider the truth or falsity of allegations in an affidavit of personal bias and prejudice and the provision requiring the certificate of a member of the bar is a precaution against abuse of the privilege afforded by the act. The good faith certificate of counsel of record is indispensible and affidavits which are not accompanied by the certificate are insufficient and may not be filed."

In the case of *Flegenheimer* v. *United States,* 110 F. 2d 379, the Court said:

> "We find no improper conduct in the counsel of the deceased certifying to the good faith of deceased's affidavit of bias and it is not necessary for us to decide, and we do not decide, the question of whether that affidavit was well founded or not. That question is not before us and not necessary to our decision. But we find nothing to impugn the good faith of Governor Silzer and his associates in the surrender of the deceased to the Commissioner or in signing the certificate which the statute provided for. That they tried to induce the deceased not to file the affidavit does not imply that they used bad faith thereafter in signing it, as long as the deceased honestly believed that the Judge was biased and stated on what facts he based his opinion, it was his right to call on his counsel to give the certificate provided by the statute in order to have the question of bias determined."

In the same case, *United States* v. *Flegenheimer,* 14 Supp. 584, the Court said:

> "Counsel can hardly be required to certify to the good faith of a client. They cannot be asked to set themselves up as guarantors of his mental processes.

They can only be required to certify with regard to their own.

In the case of *Morrison* v. *United States,* 226 F. 2d 444, the Court said:

> "Upon examination of this section of the statute, and of the decisions construing the same, we are constrained to the opinion that it was not within the province of the trial judge to pass upon the good faith of the defendant, the affidavit being sufficient in form and accompanied by the required certificate of counsel as to good faith."

In this connection we call attention to 29 A. L. R., Note 1276, and the authorities collected therein. We also call attention to the case of *Muller* v. *People*, 15 Colo. 437, 9 L. R. A. 566, wherein it was held that an affidavit of bias and prejudice was not contempt of court.

Conclusion

We say therefore that the United States Court of Appeals has not given proper effect to the decision of this Court in the *Nye* case. We say also that there is a conflict in the opinion in this case with the opinion of the Sixth Circuit in the *Schmidt* case and that therefore certiorari is justified.

In view of what has been said it is respectfully submitted that petition for writ of certiorari should be granted.

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